83-6413

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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

CHRISTOPHER BURGER,

Petitioner,

v.

WALTER ZANT, WARDEN,
GEORGIA DIAGNOSTIC AND
CLASSIFICATION CENTER,

Respondent

APPENDIX TO

PETITION FOR WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

APPENDIX A

Opinion of Eleventh Circuit in Burger v. Zant

classification in § 4216 bears a rational relationship to that goal. Congress had to distinguish persons who are sufficiently young to benefit from the program from those who are not. Congress settled on the twenty-sixth birthday as the bright line limit and apparently concluded that age at the time of conviction is more important than age at the time of the offense for rehabilitation purposes. We see no equal protection problem in drawing the line where Congress did.

[2] Finally, relying upon *United States v. Rivera*, 427 F.Supp. 89 (S.D.N.Y.1977), Thompson apparently contends that by not applying the act to him the court deprived him of his rights to due process under the Fifth Amendment. In *Rivera*, the defendant entered his plea of guilty after his twenty-sixth birthday only because of an unusual delay after his arrest. The delay was attributable in part to the defendant's assertion of his constitutional rights and in part to circumstances beyond his control. To avoid constitutional problems, the *Rivera* court construed section 4216 as applying to the defendant's case. We do not determine whether we agree with the *Rivera* court, see *United States v. Riffe*, 600 F.2d 1146, 1147 (5th Cir.1979), because that case is readily distinguishable. In the instant case the defendant's twenty-sixth birthday occurred before his arrest, less than two months after his first unlawful possession of food stamps and more than six months before his plea of guilty. There is no indication either of improper delay or that Thompson could have entered his plea of guilty before his twenty-sixth birthday but for his having raised proper constitutional questions. Thus, we conclude that the trial court's application of 18 U.S.C. § 4216 to the instant case did not deprive the defendant of due process.

AFFIRMED.

Christopher A. BURGER, Plaintiff-Appellee, Cross-Appellant,

v.

Walter A. ZANT, Warden, Georgia Diagnostic and Classification Center, Defendant-Appellant, Cross-Appellee.

No. 81-7419.

United States Court of Appeals, Eleventh Circuit.

Oct. 13, 1983.

Rehearing and Rehearing En Banc Denied Feb. 13, 1984.

Defendant was convicted of murder, and on appeal, Georgia Supreme Court, 242 Ga. 28, 247 S.E.2d 834, affirmed conviction but vacated death sentence and remanded for resentencing. On remand, defendant was again sentenced to death, and Georgia Supreme Court, 245 Ga. 458, 265 S.E.2d 796, affirmed. After United States Supreme Court denied certiorari, defendant filed petition for writ of habeas corpus, and United States District Court for the Southern District of Georgia, B. Avant Edenfield, J., 513 F.Supp. 772, granted writ and vacated death sentence, and state appealed. The Court of Appeals, Vance, Circuit Judge, held that: (1) where one of three aggravating circumstances remained valid, fact that other two were reversed as erroneous did not render entire verdict invalid, and (2) death sentence may constitutionally be imposed under Georgia's aggravating circumstance that defendant's crime was, inter alia, outrageously or wantonly vile, horrible or inhuman in that it involved torture, based on finding that defendant inflicted either psychological or physical torture upon his victim.

Reversed and remanded.

Johnson, Circuit Judge, dissented and filed opinion.

1. Criminal Law ⇐1208.1(5)

Where one of three aggravating circumstances remained valid, fact that other two were reversed did not render entire

verdict sentencing defendant to death invalid.

2. Habeas Corpus ⇐30(1)

Failure to object at resentencing hearing did not bar review of issue whether trial court erroneously instructed on aggravating circumstances, because state Supreme Court ruled on its merits, and because state waived procedural default by not raising it.

3. Criminal Law ⇐796

In instructing on aggravating circumstance that jury may impose death penalty if defendant's crime was, inter alia, outrageously or wantonly vile, trial court need not supply additional definitions or limiting instructions. O.C.G.A. § 17–10–30(b)(7).

4. Homicide ⇐340(4)

Although trial judge, in instructing on aggravating circumstance that offense of murder was, inter alia, outrageously or wantonly vile, did not expressly specify that jury could not find that a crime was "outrageously or wantonly vile, horrible or inhuman" without making a specific finding that it demonstrated "torture, depravity of mind, or an aggravated battery to the victim," jury returned verdict that clearly revealed its understanding that the two clauses were interrelated, and therefore trial court did not err in its instruction. O.C.G.A. § 17–10–30(b)(7).

5. Homicide ⇐340(4)

Trial court, in instructing on aggravating circumstance that offense of murder was, inter alia, outrageously or wantonly vile, did not err by failing to instruct that jury could not find "depravity of mind" without finding that defendant had tortured or physically abused victim before his death, because jury's verdict clearly linked "torture and depravity of mind." O.C.G.A. § 17–10–30(b)(7).

6. Criminal Law ⇐1208.1(5)

Death sentence may constitutionally be imposed under Georgia statutory aggravating circumstance, which provides for imposition of death sentence where defendant's crime was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to victim, based on finding that defendant inflicted either psychological or physical torture upon victim. O.C.G.A. § 17–10–30(b)(7).

William B. Hill, Jr., Asst. Atty. Gen., Atlanta, Ga., for defendant-appellant, cross-appellee.

Millard Farmer, Joe Nursey, Andrea I. Young, Pamela L.J. Arangno, Atlanta, Ga., for plaintiff-appellee, cross-appellant.

Appeal from the United States District Court for the Southern District of Georgia.

Before VANCE and JOHNSON, Circuit Judges, and ALLGOOD *, District Judge.

VANCE, Circuit Judge:

The state of Georgia appeals the district court's grant of a petition for a writ of habeas corpus setting aside the death sentence of Christopher Burger.

The facts in this case are set out in the district court's opinion. *Burger v. Zant*, 513 F.Supp. 772, 788–89 (S.D.Ga.1981). Briefly, Christopher Burger and Thomas Stevens, both soldiers at Fort Stewart, Georgia, were indicted for the murder of Roger Honeycutt, also a soldier. On September 4, 1977, Burger and Stevens decided to rob a taxicab driver. The victim, who supplemented his military income by driving a taxi, picked up the two men. Burger and Stevens threatened Honeycutt with knives, forced him to stop the cab and robbed him of sixteen dollars. The victim was placed in the back seat of the cab with Stevens. As Burger drove the vehicle, Stevens forced Honeycutt to disrobe and then to participate in acts of oral and anal sodomy. The victim, nude and bound, was then placed in the trunk of the cab.

* Honorable Clarence W. Allgood, U.S. District Judge for the Northern District of Alabama, sitting by designation.

With Honeycutt still in the trunk, Burger drove the cab to the local airport, where he and Stevens met a friend and fellow soldier, James Botsford. As they drove back to Fort Stewart, Burger and Stevens explained what they had done, confirming their story by exchanging remarks with Honeycutt in the trunk. After some discussion, Botsford convinced his friends to promise to release Honeycutt unharmed. They dropped Botsford off at the post.

Burger and Stevens then drove to a nearby "borrow pit" which was filled with water. After removing their fingerprints from the cab and removing its radio, Burger raised the trunk and asked Honeycutt if he was all right. Honeycutt responded affirmatively. Burger then closed the trunk, started the car and drove it into the pond, jumping out as it entered the water. The victim died by drowning.

Christopher Burger was convicted of murder and sentenced to death. Stevens was tried separately, convicted, and also sentenced to death. *Stevens v. State*, 242 Ga. 34, 247 S.E.2d 838 (1978). On direct appeal to the Georgia Supreme Court, Burger's conviction was affirmed but his death sentence was vacated and the case remanded for resentencing. *Burger v. State*, 242 Ga. 28, 247 S.E.2d 834 (1978).

On remand, Burger was once again sentenced to death and the sentence was affirmed by the Supreme Court of Georgia. *Burger v. State*, 245 Ga. 458, 265 S.E.2d 796 (1980). The United States Supreme Court denied certiorari. 448 U.S. 913, 101 S.Ct. 31, 65 L.Ed.2d 1175 (1980).

After unsuccessfully exhausting available state post-conviction remedies, Burger filed a petition for a writ of habeas corpus in federal district court. The district judge granted the writ insofar as it vacated Burger's death sentence.

The state of Georgia as appellant and Burger as appellee/cross-appellant raise five issues before this court: whether Burger was denied effective assistance of counsel; whether the jury instructions impermissibly shifted the burden of proof onto the defendant; whether *Miranda* violations occurred; whether the district court properly vacated Burger's death sentence where the jury instructions concerning two of the three aggravating circumstances upon which it was based were insufficient; and whether the jury instruction on the aggravating circumstance set out in Ga.Code Ann. § 27-2534.1(b)(7) sufficiently channeled the discretion of the jury to impose the death sentence.[1] All of these questions were carefully analyzed in District Judge Edenfield's opinion. 513 F.Supp. at 788-803. As to the first three issues, we adopt Judge Edenfield's opinion as our own. The final two issues require discussion.

(1)

The *Stephens* Issue

Christopher Burger's sentencing jury based its death sentence upon three statutory aggravating circumstances: (a) the "offense of murder was committed while the offender was engaged in the commission of another capital felony, kidnapping"; (b) the "offense of murder was committed while the offender was engaged in the commission of another capital felony, armed robbery"; (c) the offense of murder was "outrageously or wantonly vile, horrible or inhuman in that it involved torture and depravity of mind." On direct review, the Georgia Supreme Court held that the trial court had erroneously failed to instruct the jury on the definitions of kidnapping and robbery. The Georgia Supreme Court upheld the death sentence, however, based on the single remaining aggravating circumstance. *Burger v. State*, 265 S.E.2d at 800.

The district court vacated Burger's death sentence, holding that the Supreme Court of Georgia's disposition of the first two aggravating circumstances rendered the entire verdict invalid. The district judge

1. In addition, Burger challenges the sufficiency of the evidentiary hearing conducted by the district court. This contention is patently frivolous. The most cursory examination of the district judge's opinion demonstrates the care with which he treated the case and the seriousness with which he regarded the issues raised by Burger.

based his decision on our opinion in *Stephens v. Zant*, 631 F.2d 397, *modified on panel rehearing*, 648 F.2d 446 (5th Cir. 1981),[2] and Burger and Georgia agree that *Stephens* controls this issue in the present case. Certiorari was granted in the United States Supreme Court in *Zant v. Stephens*, 454 U.S. 814, 102 S.Ct. 90, 70 L.Ed.2d 82 (1981), *question certified to the Georgia Supreme Court*, 456 U.S. 410, 102 S.Ct. 1856, 72 L.Ed.2d 222, *question answered*, 250 Ga. 97, 297 S.E.2d 1 (1982).

[1] On June 22, 1983, the United States Supreme Court decided *Zant v. Stephens*, —— U.S. ——, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), reversing the judgment rendered by a panel of the former fifth circuit. The Court held that under the Georgia capital punishment statute the invalidity of one of a plurality of statutory aggravating circumstances does not require that the entire death sentence be vacated. The Court found the death penalty in that case permissible because there were two remaining aggravating circumstances that "adequately differentiate[d that] case in an objective, evenhanded, and substantively rational way from the many Georgia murder cases in which the death penalty may not be imposed." *Id.* at ——, 103 S.Ct. at 2744. So long as "at least one of a plurality of aggravating circumstances found by the jury is valid and supported by the evidence," *Zant v. Stephens*, 456 U.S. 410, 414, 102 S.Ct. 1856, 1857, 72 L.Ed.2d 222 (1982), the death sentence may stand. We thus reverse the district court's order compelling resentencing based on our opinion in *Stephens*.

(2)

The *Godfrey* Issue

Burger also challenged the adequacy of the trial court's charge on the sole remaining aggravating circumstance that was applied in his case. Under Ga.Code Ann. § 17–10–30(b)(7), a jury may impose the death penalty if it finds that the defendant's crime was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." Since "[i]t is, of course, arguable that any murder involves depravity of mind or an aggravated battery," *Gregg v. Georgia*, 428 U.S. 153, 201, 96 S.Ct. 2909, 2938, 49 L.Ed.2d 859 (1976), the potential subjectivity of § (b)(7) has made it the target of numerous constitutional challenges. Although the Supreme Court ruled that § (b)(7) was not unconstitutional on its face in *Gregg*, the Court conceded that the statutory language might be subject to abuse if the Georgia Supreme Court were to adopt "an open-ended construction" of its terms. *Id.* Four years later, the Court re-examined the operation of § (b)(7) in *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), and concluded that the Georgia courts had strayed from the straight and narrow path marked out in *Gregg*. In *Godfrey*, there was no allegation that the murders committed by the defendant involved either torture or an aggravated battery, and the sentencing jury based its imposition of the death penalty on the simple grounds "that the offense of murder was outrageously or wantonly vile, horrible and inhuman." The Georgia Supreme Court upheld the sentence on review, but the Supreme Court reversed. Writing for a plurality of the Court, Justice Stewart held that the jury's findings were an insufficient basis for imposing the death penalty, because "nothing in these few words, standing alone ... implies any inherent restraint on the arbitrary and capricious infliction of the death sentence." *Id.* at 428, 100 S.Ct. at 1765. Although Justice Stewart found that the Georgia Supreme Court in *Godfrey* had ignored its responsibility "to keep § (b)(7) within constitutional bounds," *id.* at 429, 100 S.Ct. at 1765, he noted that other decisions by that court had placed a limiting construction on the statute

2. In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir.1981) (en banc) this circuit adopted as precedent all former fifth circuit cases submitted or decided prior to October 1, 1981. In *Stein v. Reynolds Sec., Inc.*, 667 F.2d 33, 34 (11th Cir.1982), the court held that Unit B panel or en banc court decisions of the former fifth circuit also are binding precedent in the eleventh circuit.

that was sufficient to bring § (b)(7) within the ambit of constitutional acceptability:

> The *Harris* [*v. State*, 237 Ga. 718, 230 S.E.2d 1] and *Blake* [*v. State*, 239 Ga. 292, 236 S.E.2d 637] opinions suggest that the Georgia Supreme Court had by 1977 reached three separate but consistent conclusions respecting the § (b)(7) aggravating circumstance. The first was that the evidence that the offense was "outrageously or wantonly vile, horrible or inhuman" had to demonstrate "torture, depravity of mind, or an aggravated battery to the victim." The second was that the phrase, "depravity of mind," comprehended only the kind of mental state that led the murderer to torture or to commit an aggravated battery before killing his victim. The third, derived from *Blake* alone, was that the word, "torture," must be construed *in pari materia* with "aggravated battery" so as to require evidence of serious physical abuse of the victim before death.

Id. 446 U.S. at 431, 100 S.Ct. at 1766. As long as the Georgia courts observed these precedents, Justice Stewart suggested, death sentences imposed on the basis of § (b)(7) would meet the requirements of *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

[2, 3] In the present case, the trial judge charged the jury that one of the bases for imposing the death penalty was a finding "that the offense of murder was outrageously or wantonly vile, horrible or inhumane [sic] in that it involved torture and depravity of mind." Burger contends that this was insufficient to provide adequate guidance to the jury, and asserts that the trial court was required under *Godfrey* to explain and limit the meaning of § (b)(7) in accordance with the construction of the statutory language and Georgia case law presented by Justice Stewart in the plurality opinion.[3] The district court did not expressly address the issue of whether a limiting construction was required at the sentencing phase, but two recent decisions of this circuit have rejected the argument that *Godfrey* requires the trial court to supply additional definitions or a limiting instruction in its charge to the jury. *See Westbrook v. Zant*, 704 F.2d 1487, 1501, 1504 (11th Cir.1983); *Stanley v. Zant*, 697 F.2d 955, 971 (11th Cir.1983).

The facts of *Stanley* in particular have some similarity to those in this case. Ivon Ray Stanley and his codefendant robbed

3. We note in passing that Burger did not object to the (b)(7) instruction at the resentencing hearing. This does not bar review of the issue under the doctrine of *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), however, for either of two reasons. First, we address the issue because the Georgia Supreme Court ruled on its merits. *Burger v. State*, 265 S.E.2d at 799–800. This court recently observed that "[c]onsiderations of comity and federalism have resulted in the development of a well-settled exception to the procedural default rule of *Sykes*: where a state appellate court does not rely on a procedural default, but reaches the merits of the federal law claim, the *Sykes* bar is inapplicable." *Booker v. Wainwright*, 703 F.2d 1251, 1255 (11th Cir.1983). Because in the present case the Georgia Supreme Court "entertained the federal claims on the merits, a federal habeas court must also determine the merits of appellant's claim." *Lefkowitz v. Newsome*, 420 U.S. 283, 292 n. 9, 95 S.Ct. 886, 891 n. 9, 43 L.Ed.2d 196 (1975). *See also County Court v. Allen*, 442 U.S. 140, 154, 99 S.Ct. 2213, 2223, 60 L.Ed.2d 777 (1979); *Francis v. Henderson*, 425 U.S. 536, 542 n. 5, 96 S.Ct. 1708, 1711 n. 5, 48 L.Ed.2d 149 (1976); *Westbrook v. Zant*, 704 F.2d 1487, 1491 n. 6 (11th Cir.1983); *Henry v. Wainwright*, 686 F.2d 311, 313 (5th Cir. Unit B 1982), *on remand from* 457 U.S. 1114, 102 S.Ct. 2922, 73 L.Ed.2d 1326 (1982); *Machetti v. Linahan*, 679 F.2d 236, 238 n. 4 (11th Cir.1982); *Washington v. Watkins*, 655 F.2d 1346, 1368 (5th Cir. Unit A 1981), *cert. denied*, 456 U.S. 949, 102 S.Ct. 2021, 72 L.Ed.2d 474 (1982); *Sasoon v. Stynchcombe*, 654 F.2d 371, 374 (5th Cir.1981); *Moran v. Estelle*, 607 F.2d 1140, 1142–43 (5th Cir.1979); *Cannon v. Alabama*, 558 F.2d 1211, 1216 n. 12 (5th Cir. 1977), *cert. denied*, 434 U.S. 1087, 98 S.Ct. 1281, 55 L.Ed.2d 792 (1978).

Second, the state has not raised the procedural default issue and thus it must be deemed waived. *See Goode v. Wainwright*, 704 F.2d 593, 596 n. 1, 612 n. 25 (11th Cir.1983); *Washington v. Watkins*, 655 F.2d at 1368; *Smith v. Estelle*, 602 F.2d 694, 708 n. 19 (5th Cir.1979), *aff'd*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1980); *LaRoche v. Wainwright*, 599 F.2d 722, 724 (5th Cir.1979). *Cf. Lamb v. Jernigan*, 683 F.2d 1332, 1335 n. 1 (11th Cir.1983) (state waives exhaustion requirement by failing to raise it).

their victim at gunpoint, then compelled him to accompany them to a wooded area where they beat and shot him before burying him alive. At the sentencing phase of Stanley's trial, the judge charged the jury in terms that were essentially identical to those employed by the trial court in the present case, instructing them that they could impose the death penalty if they found that Stanley's offenses were "outrageously and wantonly vile, horrible and inhuman, in that the offenses involved Defendant's depravity of mind and torture to the victim." *Stanley*, 697 F.2d at 971–72. The jury found that Stanley's offense "involved depravity of mind and torture to the victim" and sentenced him to death. *Id.* This court distinguished *Stanley* from *Godfrey* on the grounds that the charge used in the former (as well as in this case) required the jury to find that the crime involved both torture *and* depravity of mind, whereas the formulation used by the trial judge in *Godfrey* was phrased in the disjunctive language of the statute and permitted the jury to sentence the defendant to death on finding that the crime evidenced either torture or depravity of mind or an aggravated battery.[4] The jury's findings in *Godfrey* did not make it apparent which, if any, of these factors it had relied on in sentencing the defendant to death, and the absence of any evidence suggesting that the defendant had tortured or physically abused his victims before their deaths led Justice Stewart to conclude that there was "no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." *Godfrey*, 446 U.S. at 433, 100 S.Ct. at 1767. In contrast, the instructions given the *Stanley* and *Burger* juries prevented them from imposing the death sentence unless they found that the victims had in fact been tortured before death. Since the jurors in each of these cases made an explicit finding that torture had occurred, we cannot say that their reasons for imposing the death penalty must remain "the subject of sheer speculation." *Id.* at 429, 100 S.Ct. at 1765. The only remaining questions are first, whether there was anything about the instructions as given that might have led the jurors to base their sentence on a mistaken interpretation of state law, *see Sandstrom v. Montana*, 442 U.S. 510, 517, 99 S.Ct. 2450, 2455–56, 61 L.Ed.2d 39 (1979), and second, whether the state law as applied in this case is constitutional.

[4, 5] Burger contends that the trial judge's instructions in his case were defective because they did not set forth Justice Stewart's construction of the Georgia law from *Godfrey*. With regard to the first two points in Justice Stewart's analysis, however, Burger's objections are easily disposed of. Although the trial judge did not expressly specify that the jury could not find that a crime was "outrageously or wantonly vile, horrible or inhuman" without making a specific finding that it demonstrated "torture, depravity of mind, or an aggravated battery to the victim," the jury in this case—unlike the jury in *Godfrey*—returned a verdict that clearly revealed its understanding that the two clauses were interrelated. Burger also contends that the jury should have been instructed that it could not find "depravity of mind" without finding that the defendant had tortured or physically abused the victim before his death. The trial judge in *Burger*, however, clearly linked "torture and depravity of

4. The Georgia Supreme Court has stressed the importance of the fact that § (b)(7) is worded in the disjunctive, rather than the conjunctive. Thus, "[i]t is not required that a trier of fact find the existence of each disjunctive phrase in the statute, only that at least one phrase of the first clause of the statute exists due to the existence of at least one phrase of the second clause of the statute." *Fair v. State*, 245 Ga. 868, 268 S.E.2d 316, 320 (1980). Although the trial judge's charge in *Godfrey* was therefore technically correct, the jury returned a report that did not specify which, if any, of the phrases in the second clause was the basis of its death sentence. In addition, the potential subjectivity of the phrase "depravity of mind" renders a death sentence that is based upon that phrase alone more suspect than one that is based on both "depravity of mind" and one of the other factors as well. *See* note 5 *infra*.

mind" in his instructions, and the jury's verdict did likewise.[5]

Burger's final objection to the trial court's charge is somewhat more troublesome. He asserts that the jury should have been instructed that the word "torture" assumes the existence of an aggravated battery and therefore requires evidence of serious physical abuse of the victim before death. In *Stanley* and *Westbrook*, this aspect of Justice Stewart's opinion was not problematic, since it was not disputed that in both of those cases the defendant had inflicted extreme physical abuse on his victim prior to the murder itself. *See Westbrook*, 704 F.2d at 1505 & n. 18; *Stanley*, 697 F.2d at 972. In dictum, however, the *Stanley* court reflected that "[arguably], the undefined word 'torture' [might] fall[ ] short of meeting the [*Godfrey*] test because in a given case a jury might understand it to mean mental torture rather than a word to be read *in pari materia* with 'aggravated battery' to require evidence of serious physical abuse." *Stanley*, 697 F.2d at 972. There was no contention in *Stanley* that "the torture to which his victim was subjected was anything other than physical," *id.*, but the situation in the present case is far less clear. In *Burger*, the jury might have viewed the evidence that was presented in a number of different ways. The jury found that Burger had tortured his victim, and the evidence supports a finding beyond a reasonable doubt that Honeycutt was tortured before he died. There was sufficient evidence from which the jury may properly have concluded that Burger aided and abetted his codefendant Stevens in physically torturing Honeycutt, as well as that he personally tortured Honeycutt both physically and psychologically. On the other hand, it is also conceivable that the jury may have found that while Stevens physically tortured Honeycutt, Burger inflicted only psychological torture on him.[6] This case therefore requires us to answer the question which we raised but did not resolve in *Stanley*: whether there is any significant distinction between mental or psychological and physical torture under either the law of Georgia or the Constitution. If the latter is within constitutional limits but the former is not, *Sandstrom* requires that the jury must receive instructions to this effect.

The deliberate infliction of mental anguish certainly comes within the commonly understood meaning of the word "torture," [7] and the sole support which Burger offers for his argument that the court should hold differently is the language of

5. Our consideration today does not reach the situation presented by a charge of depravity of mind not involving torture or aggravated battery. That question is obviously a more difficult one in the light of *Gregg* and *Godfrey*. *Cf. Westbrook v. Zant*, 704 F.2d 1487 (11th Cir. 1983) (section (b)(7) charge stated in the disjunctive held not to require instruction in excess of statutory language). Contrary to the conclusion of Justice Stewart in *Godfrey*, the Georgia Supreme Court in a line of cases extending well before that opinion has upheld findings of depravity of mind based on such factors as age of the victim, physical characteristics of the victim and mutilation, disfigurement or sexual abuse *after* death. *See Phillips v. State*, 250 Ga. 336, 297 S.E.2d 217 at 221.

6. The district court's correct analysis of the evidence is as follows:

> Of course, the present case involves many circumstances which may readily be seen as involving "torture" and reflecting "depravity of mind." There was ample evidence upon which the jury might have found that petitioner aided and abetted in Stevens' sodomizing the victim prior to his death. Serious sexual abuse has been equated with "torture" under Georgia law. *House v. State*, 232 Ga. 140, 205 S.E.2d 217 (1974). Similarly, serious physical abuse can readily be seen in the confining of the victim in the car trunk for a period of hours, bound, nude and certainly anxious in the extreme over his captors' intentions. Likewise, there can be little argument but that petitioner's sadistic inquiry into Private Honeycutt's condition prior to submerging the taxi well-demonstrated "depravity of mind" and, further, that the victim's horror as the trunk inexorably filled amounted to "torture."

513 F.Supp. 796–99.

7. In pertinent part, the definition of torture provided by *Webster's New Collegiate Dictionary* is as follows:

> 1: the infliction of intense pain (as from burning, crushing, or wounding) to punish, coerce, or afford sadistic pleasure 2a: anguish of body or mind: agony b: something that causes agony or pain.

Justice Stewart's plurality opinion in *Godfrey*. As an initial matter, it is important to emphasize that the *Godfrey* plurality's reversal of the death sentences imposed in his case ultimately stemmed not from its dissatisfaction with the jury instructions, but from its belief that the Georgia Supreme Court had failed to carry out its place in the statutory scheme given conditional approval in *Gregg*.

> In past cases the State Supreme Court has apparently understood this obligation of carrying with it the responsibility to keep § (b)(7) within constitutional bounds .... Thus, the validity of the petitioner's death sentences turns on whether, in light of the facts and circumstances of the murders that he was convicted of committing, the Georgia Supreme Court can be said to have applied a constitutional construction of the [statute].

446 U.S. at 429, 432, 100 S.Ct. at 1765, 1767. Thus, the key inquiry in the minds of the *Godfrey* plurality was whether the Georgia Supreme Court had kept faith with its own expressed standards in reviewing the defendant's sentences of death. Justice Stewart found that it had not done so in *Godfrey*, basing this view on his construction of the Georgia statute and case law. He noted, however, that his research was limited to cases pre-dating 1978, and he conceded that the third of the "separate but consistent conclusions" which he deduced from the Georgia case law—the requirement that torture be construed *in pari materia* with "aggravated battery"—was derived from a single decision, *Blake v. State*, 239 Ga. 292, 236 S.E.2d 637 (1977). The basis for Justice Stewart's conclusion was apparently the Georgia Supreme Court's statement that it "[c]onsider[ed] torture and aggravated battery on the one hand *as substantially similar treatment* of the victim and depravity of mind on the other hand as relating to the defendant ...." 236 S.E.2d 643 (emphasis added).

Although Justice Stewart's construction of the Georgia law on this point was strongly criticized at the time, *see, e.g., Godfrey*, 446 U.S. at 435–36, 100 S.Ct. at 1768–69 (Marshall, J., concurring in the judgment); 446 U.S. at 443, 100 S.Ct. at 1772–73 (Burger, C.J., dissenting); Donohue, *Godfrey v. Georgia: Creative Federalism, the Eighth Amendment, and the Evolving Law of Death*, 30 *Cath.U.L.Rev.* 13, 44–47 (1980), the Georgia Supreme Court subsequently affirmed its adherence to his construction in *Hance v. State*, 245 Ga. 856, 268 S.E.2d 339 (1980), where the court noted that "[t]orture occurs when the victim is subjected to serious physical abuse before death." 268 S.E.2d at 345. The *Hance* court went on, however, to embrace an expansive definition of the term "serious physical abuse":

> Serious sexual abuse may be found to constitute serious physical abuse. [citation omitted] Torture also occurs when the victim is subjected to an aggravated battery as hereinabove defined. Evidence of psychological abuse by the defendant to the victim before death where it is shown to have resulted in severe mental anguish to the victim in anticipation of physical harm may amount to serious physical abuse (i.e., torture of the victim), and also will support a finding of depravity of mind of the defendant.

Id. Subsequent decisions by Georgia's highest court have reaffirmed its interpretation of "physical abuse" as including both sexual and psychological abuse as well. *See, e.g., Phillips v. State*, 250 Ga. 336, 297 S.E.2d 217, 221 (1982); *Brown v. State*, 247 Ga. 298, 275 S.E.2d 52, 58 (1981).

Since the Georgia law therefore follows common usage in finding that the deliberate infliction of mental anguish constitutes "torture," we conclude that the trial court's failure to elaborate or define the term further does not run afoul of the rule in *Sandstrom*. In meaningful contrast to the more amorphous term "depravity of mind," "torture" has a readily understandable and generally understood meaning. This excludes a reasonable risk that the jury might give it an unintended interpretation.

We see no basis for concluding that the definition of "torture" applied by the Georgia courts violates substantive federal constitutional guarantees. The central theme

of the Supreme Court's death penalty jurisprudence has always been that the states must draft and apply their capital punishment laws in a manner that "genuinely narrow[s] the class of persons eligible for the death penalty," *Zant v. Stephens*, —— U.S. at ——, 103 S.Ct. at 2742–43, thereby providing a "principled basis for distinguishing [a] case, in which the death penalty [is] imposed, from the many in which it [is] not." *Godfrey*, 446 U.S. at 433, 100 S.Ct. at 1767. The Georgia Supreme Court has recently demonstrated that it will not allow the category of psychological abuse to become all-inclusive.[8] In *Phillips v. State*, *supra*, the court emphasized that a finding of "serious psychological abuse" required a showing that "the defendant inflicted deliberate, offensive and prolonged pain on his victim prior to death." 297 S.E.2d at 221. Thus, "the mere apprehension of death, immediately before the fatal wounds are inflicted" was found insufficient to justify a finding of "torture" under § (b)(7). *Id.*

[6] We therefore decide that a death sentence may constitutionally be imposed under § (b)(7) based on a finding that the defendant inflicted either psychological or physical torture upon his victim. We can discern no principled basis for attempting to distinguish the two, and it seems highly questionable that Justice Stewart meant to draw such a distinction in *Godfrey*. The standards applied by the Georgia courts certainly restrict the class of persons eligible for the death penalty by reason of the "torture" provision of § (b)(7), and the facts of this case easily place it within the core of those the statute was designed to reach. Burger's contentions must therefore be rejected.

Having concluded that both phases of Burger's trial are free of constitutional error, we reverse the judgment of the district court and remand with instructions that the writ be denied.

REVERSED and REMANDED.

8. Here, of course, as in *Zant v. Stephens*, our decision "depends in part on the existence of an important procedural safeguard, the mandatory appellate review of each death sentence by the Georgia Supreme Court to avoid arbitrariness and to assure proportionality." —— U.S. at ——, 103 S.Ct. at 2749.

JOHNSON, Circuit Judge, dissenting:

I concur in the majority's opinion except that, for the following reasons, I dissent from that part of the opinion adopting the district court's opinion and order, 513 F.Supp. at 795–98, denying Burger's petition for habeas corpus relief on the grounds that he was denied the right to effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments at both of his state court trials and on appeal to the Supreme Court of Georgia. A review of the record reveals that Burger was denied the effective assistance of counsel both by his appointed counsel's active representation of his co-indictee's conflicting interest and by his counsel's failure to present any evidence in mitigation at either of his two sentencing proceedings.

A review of the general principles applicable to all ineffective assistance of counsel claims is in order. The Sixth Amendment guarantees a criminal defendant the right to "*effective* assistance of counsel, that is, counsel reasonably likely to render and rendering effective assistance." *Washington v. Strickland*, 693 F.2d 1243, 1250 (5th Cir. Unit B 1982) (en banc), *cert. granted*, —— U.S. ——, 103 S.Ct. 2451, 77 L.Ed.2d 1332 (1983). The appropriate methodology for determining whether there has been effective assistance of counsel is to examine the totality of circumstances in the record. *Baty v. Balkcom*, 661 F.2d 391, 394 (5th Cir. Unit B 1981). Although neither in capital nor in noncapital cases is defendant entitled to error-free counsel, the "number, nature and seriousness of the charges against the defendant are all part of the 'totality of the circumstances in the entire record' that must be considered in the effective assistance calculus." *Washington v. Watkins*, 655 F.2d 1346, 1357 (5th Cir.1981).

Turning first to Burger's conflict of interest claim, in order to establish the constitutional predicate for ineffective assistance

Burger must show that his counsel actively represented actually conflicting interests. *Cuyler v. Sullivan*, 446 U.S. 335, 349–50, 100 S.Ct. 1708, 1718–19, 64 L.Ed.2d 333 (1980); *Westbrook v. Zant*, 704 F.2d 1487, 1499 (11th Cir.1983). Applying this standard to the facts of this case, the record is clear that Burger's counsel was actively representing both Burger and his co-indictee Stevens and that an actual conflict of interest between the two violated Burger's right to the effective assistance of counsel.[1]

First, it is apparent that Burger's counsel actively represented both Burger and Stevens. Both Burger and Stevens were charged with and indicted for the murder of Roger Honeycutt. Both Burger and Stevens were appointed counsel by the trial court at approximately the same time, and within a few weeks after they had been charged with the crime. Burger's appointed counsel, Leaphart, and Stevens' appointed counsel, Smith, were partners in a two-partner law firm. At the federal habeas hearing, Leaphart testified that he interviewed both Burger and Stevens. Leaphart testified that he assisted Smith in the preparation of Stevens' case and that Smith assisted him in the preparation of Burger's case. Leaphart and Smith discussed the issues involved in each case and researched the law together. Smith sat at counsel table and assisted Leaphart during Burger's trial. Although not physically present at Stevens' trial, Leaphart testified that "I worked then with—discussed the issues with Bob [Smith]. We researched the law together."[2] Smith and Leaphart collaborated in preparing the briefs for both Burger and Stevens on each defendant's first appeal to the Supreme Court of Georgia; Leaphart testified that he "primarily" prepared the briefs for Burger and Stevens on the second appeal to the Supreme Court of Georgia.[3] The fee received by each attorney for representing each client was deposited in the law firm's corporate account. At no time in his representation of Burger did Leaphart or the trial court ever inform Burger of a possible conflict of interest.

Whether analyzed as a situation where one attorney, Leaphart, represented both Burger and Stevens,[4] or where one law firm represented both Burger and Stevens,[5] the

1. The Sixth Amendment guarantee of effective assistance of counsel necessarily includes the guarantee of conflict-free counsel. *Glasser v. United States*, 315 U.S. 60, 70, 62 S.Ct. 457, 464–65, 86 L.Ed. 680 (1942); *United States v. Alvarez*, 580 F.2d 1251, 1254 (5th Cir.1978).

2. Transcript of Federal Habeas Corpus Hearing ("THC") at 18.

3. THC at 40–41.

4. The warden-appellant argues that the conflict of interest cases relied upon by Burger are inapposite as involving the representation of multiple defendants by one attorney. Here, appellant contends, Burger and Stevens were represented by "separate" attorneys. This argument is contrary to the facts as reflected by the record. Leaving aside the fact that Leaphart and Smith were partners in the practice of law, the attorneys here were each active in the defense of the other's client and "seem to have viewed themselves as a defense 'team' acting on behalf of [both] of the accused." *United States ex rel. Sullivan v. Cuyler*, 593 F.2d 512, 515 (3d Cir.1979), *rev'd on other grounds*, *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). Leaphart consulted confidentially with Stevens, aided in preparing his case for trial, and prepared the briefs for both of his appeals. "Whatever may have been the extent of each attorney's participation in the trial of the . . . defendants, we are satisfied that it was sufficient to establish that both attorneys represented [both] defendants." *Id.*

5. "The same principles [governing Sixth Amendment conflict of interest claims] apply where the joint representation is by two members of the same firm." *Ross v. Heyne*, 638 F.2d 979, 983 (7th Cir.1980) (*quoting United States v. Helton*, 471 F.Supp. 397, 399 n. 1 (S.D.N.Y.1979)); *see also United States v. Donahue*, 560 F.2d 1039, 1042 (1st Cir.1977) ("[t]he same rule applies with equal force to representation of two or more defendants by members of the same law firm."). *Cf. Zuck v. Alabama*, 588 F.2d 436, 438 (5th Cir.1979) (ineffective assistance found where "[t]he law firm which served as counsel to Zuck in his murder trial also represented, in an unrelated civil matter, the state prosecutor who tried Zuck."); Fed.R.Crim.Pro. 44(c) ("[w]henever two or more defendants have been jointly charged . . . and are represented by . . . retained or appointed counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including

end result on these facts is the same: Leaphart was actively involved in the defense of both to the extent that a conflict of interest was clearly established.

Although multiple representation is the paradigm context in which conflict of interest claims arise,[6] a finding of multiple representation alone does not establish ineffective assistance of counsel. *Foxworth v. Wainwright*, 516 F.2d 1072 (5th Cir.1975). The conflict must be shown to be actual, not speculative, before it will cause representation to fail Sixth Amendment standards. *Baty v. Balkcom*, 661 F.2d at 397. "An actual conflict of interest occurs when a defense attorney places himself in a situation 'inherently conducive to divided loyalties.' " *Zuck v. Alabama*, 588 F.2d 436, 439 (5th Cir.1979) (*quoting Castillo v. Estelle*, 504 F.2d 1243, 1245 (5th Cir.1974)); *see also Baty v. Balkcom*, 661 F.2d at 397 ("[a]n actual conflict of interest exists if counsel's introduction of probative evidence or plausible arguments that would significantly benefit one defendant would damage the defense of another defendant whom the same counsel is representing.").

In this case, the fundamental issue, as perceived by counsel, was not that of guilt, but of culpability. Upon the habeas corpus hearing Leaphart testified at length concerning the evidence supporting Burger's lesser degree of culpability for the murder as compared to Stevens'.[7] Summarized, the evidence was that at the time the crime was committed Burger was seventeen; Stevens was twenty. Burger has an I.Q. of 82 and possible brain damage. Stevens appeared to be the leader in their relationship; Burger the follower. Stevens planned and initiated the robbery of the victim; Burger followed his instructions. Stevens actually committed the robbery; Stevens made the victim undress; Stevens forced the victim to perform oral sodomy on Stevens; Stevens anally sodomized the victim; Stevens tied the victim up and forced him to get in the trunk of the cab. Stevens told Burger they would have to kill him; Burger said he didn't want to kill him. Stevens told Burger they would have to get rid of the cab by driving it into the pond; Stevens ordered Burger to drive the cab with the victim locked in the trunk into the pond. Burger drove the cab and the victim into the pond. In short, the essence of Burger's defense was that he was less culpable than Stevens.

In such a situation, any evidence or arguments made by counsel in Burger's behalf would, by the very nature of Burger's defense, damage Stevens. An actual conflict of interest between Burger and Stevens is thus apparent. Stated differently, Burger's interests were drastically adverse to those of Stevens.

> If a defense attorney owes duties to a party whose interests are adverse to those of the defendant, then an actual conflict of interest exists. The interests of the other client and the defendant are sufficiently adverse if it is shown that the attorney owes a duty to the defendant to take some action that could be detrimental to his other client.
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> *Zuck v. Alabama*, 588 F.2d at 439.

The course of Burger's state court proceedings illuminates the duty owed him by Leaphart to take actions that could be detrimental to Stevens. First, Leaphart did not at any time in his representation of

separate representation."), *construed in Ross v. Heyne*, 638 F.2d at 983 ("[t]he Supreme Court's proposal of this rule indicates its recognition that the potential constitutional problems attendant to multiple representation are present when different attorneys from the same legal partnership represent co-defendants with conflicting interests."); *ABA Code of Professional Responsibility* DR 5-105(D). Further, the Supreme Court of Georgia, exercising its supervisory role over the Bar, has adopted a mandatory rule in death penalty cases that co-defendants must be provided with separate and independent counsel. *Fleming v. State*, 264 Ga. 90, 270 S.E.2d 185 (1980). This rule applies with equal force to representation by a single attorney or by members of the same law firm. *Id.* at 188 n. 7.

6. *See Cuyler v. Sullivan*, 446 U.S. at 348, 100 S.Ct. at 1718 ("[a] possible conflict of interest inheres in almost every instance of multiple representation"); *United States v. Alvarez*, 580 F.2d 1251, 1254 (5th Cir.1978).

7. THC at 20–23.

Burger offer Burger's testimony against Stevens in exchange for a sentence less than the death penalty for Burger.[8] *See Baty v. Balkcom*, 661 F.2d at 397 n. 12 ("[p]lea bargains are perhaps the most obvious example of the manifest effects of a conflict of interest at pretrial proceedings."); *see also Fleming v. State*, 246 Ga. 90, 270 S.E.2d 185, 189 (1980) (Bowles, J., concurring) ("[n]o two defendants share equal responsibility for a crime. Usually one is more culpable than the other or for any number of reasons has a greater degree of responsibility for what occurred. One may also be more entitled to leniency based on such factors as age, intelligence, motive, background, previous conduct or record, etc. Common counsel eliminates any practical possibility of plea bargaining."). Second, at Burger's trial Stevens was not called as a witness by the defense. If Stevens had been called by the state, Leaphart would have been placed in the untenable position of cross-examining his own client. Finally, Leaphart prepared the briefs for both Burger and Stevens on each defendant's second appeal to the Supreme Court of Georgia. In Burger's brief, Leaphart does not argue that he was the less culpable party, although the scope of the Supreme Court of Georgia's appellate review in capital cases includes a consideration of whether the "sentence of death is excessive or disproportionate to the penalty in similar cases, considering both the crime and the defendant." O.C.G.A. § 17–10–35(c)(3) (1982), formerly Ga.Code Ann. § 27–2537(c)(3) (1933).

Once an actual conflict of interest is shown, without further inquiry, prejudice to the defendant is presumed. *Westbrook v. Zant*, 704 F.2d 1487, 1499 (11th Cir.1983). "It is well established that when counsel is confronted with an actual conflict of interest, prejudice must be presumed, and except under the most extraordinary circumstances, the error cannot be considered harmless." *Baty v. Balkcom*, 661 F.2d at 395 (*quoting Turnquest v. Wainwright*, 651 F.2d 331, 334 (5th Cir.1981)). The rationale for dispensing with the requirement of a showing of prejudice in conflict of interest cases "becomes apparent when one considers the nigh impossible task of making a meaningful qualitative analysis of trial counsel proficiency, in a case involving divided loyalties, from an examination of the transcript alone." *Johnson v. Hopper*, 639 F.2d 236, 239 (5th Cir. Unit B 1981). The degree to which counsel's strategic decisions and performance throughout the course of his representation are affected by an actual conflict of interest subtly pervading the whole of the defense may not be manifested in his conduct at trial alone. "[T]he sixth amendment requires that a defendant may not be represented by counsel who might be tempted to dampen the ardor of his defense in order to placate his other client. The fact that a particular lawyer may actually resist the temptation is of no moment." *Zuck v. Alabama*, 588 F.2d at 440.

In light of this precedent it is clear that the presumption of prejudice arising from an actual conflict of interest cannot be overcome by evidence that counsel did, in fact, vigorously pursue one client's defense to the detriment of the other at trial. Although the factual content of the extraordinary circumstances in which the error of representing actually conflicting interests is considered harmless has not been delineated by this Court, it is apparent that a showing

8. At the federal habeas hearing, Leaphart testified that he had not, at any time during his representation of Burger, discussed with the district attorney the possibility of Burger's testifying against Stevens in return for a lighter sentence. THC at 38–39. When further questioned about plea negotiations in Burger's case, Leaphart testified that he had engaged in plea negotiations, but that "*during the first trial* [the district attorney] refused to discuss it in any terms." THC at 65 (emphasis supplied). From this account, it appears that plea negotiations were entered into in this case; that Leaphart never offered Burger's testimony against Stevens; and that, after Burger's first trial had begun, the district attorney refused to discuss a plea on whatever terms Leaphart had offered, presumably not the terms of Burger's testifying against Stevens since Leaphart testified he did not at any time make such an offer. Thus, appellant's argument that no *pretrial* conflict of interest could have arisen due to the district attorney's refusal to plea bargain is contradicted by the record.

of no adverse effect upon counsel's performance at trial or no impairment of his client's defense does not constitute such a circumstance.

Thus, accepting the district court's findings, those findings having been adopted by the majority in this case, that Leaphart "in no way tailored his strategy toward protecting Stevens" at Burger's trial, and that the trial record "shows considerable effort to gain mercy for petitioner by portraying Stevens as the chief architect of the crime," the presumption of prejudice from the actual conflict of interest between Burger and Stevens remains. Further, the actual conflict of interest between Stevens and Burger was not limited to Burger's trial, but permeated the entire course of Burger's state court proceedings. Once Burger established that an actual conflict of interest was present, whether at pretrial plea negotiations, trial or on appeal, and that his counsel actively represented both interests, his claim of ineffective assistance of counsel was complete.

I turn now to Burger's claim that he was denied the effective assistance of counsel because his counsel failed to present *any* evidence in mitigation, or otherwise, at either of his two sentencing proceedings. In *Stanley v. Zant*, 697 F.2d 955, 962 (11th Cir.1983), this Court rejected a claim that failure to present any mitigating evidence at the sentencing proceeding in addition to that presented at the guilt phase of the trial constituted per se ineffective assistance of counsel. Although, unlike Stanley's attorney, Burger's attorney did not present *any* evidence during either the guilt or two sentencing phases, it is not necessary to articulate a per se rule of ineffectiveness in this case as "application of general principles governing effectiveness of counsel to the specific context of a capital sentencing proceeding," *id.*, demonstrates the ineffectiveness of Burger's counsel.

Counsel's duty of effective representation continues into the sentencing phase of his client's trial. *King v. Strickland*, 714 F.2d 1481, at 1491 (11th Cir.1983).

> The sentencing phase of any case regardless of the potential punishment, is 'the time at which for many defendants the most important services of the entire proceedings can be performed.' ABA Standard on Criminal Justice, Sentencing Alternatives and Procedures § 5.3(e). The special importance of the capital sentencing proceeding gives rise to a duty on the part of defense counsel to be prepared for that crucial phase of the trial. *Stanley v. Zant*, 697 F.2d at 963.

"At the heart of the duty of effective representation is the independent duty to investigate and prepare." *Goodwin v. Balkcom*, 684 F.2d 794, 805 (11th Cir.1982). In *Washington v. Strickland*, 693 F.2d 1243 (5th Cir. Unit B 1982), the en banc court delineated the content of this duty to investigate:

> A strategy chosen without the benefit of a reasonably substantial investigation into all plausible lines of defense is generally based upon counsel's professional assumptions regarding the prospects for success offered by the various lines. The cases generally conform to a workable and sensible rule: when counsel's assumptions are reasonable given the totality of the circumstances and when counsel's strategy represents a reasonable choice based upon those assumptions counsel need not investigate lines of defense that he has chosen not to employ at trial.
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> • • • • • •
>
> In sum, an attorney who makes a strategic choice to channel his investigation into fewer than all plausible lines of defense is effective so long as the assumptions upon which he bases his strategy are reasonable and his choices on the basis of those assumptions are reasonable. *Id.* at 1255, 1256 (footnotes omitted).

"An attorney may proceed absent a reasonable investigation into all potential lines of defense, but he does so at his peril." *Stanley v. Zant*, 697 F.2d at 966. Finally, once a showing of ineffective assistance of counsel due to counsel's failure to investigate has been made, the second prong of *Washington*

v. *Strickland* requires that prejudice from this error be demonstrated. *Id.* at 1258.

The district court found that Leaphart's investigation into available mitigating evidence consisted solely of conversations with Burger's mother. Although it is unclear what the content of those conversations, as relating to mitigating evidence concerning Burger's background outside of Wayne County, Georgia, and the identity of possible character witnesses, was found to be, the district court concluded that Leaphart made "adequate if hardly ideal inquiries," and that his "investigation appears to meet at least minimal professional standards." Clearly by no stretch of the imagination could Leaphart's investigation be characterized as reasonably substantial. Since Leaphart failed to conduct a reasonably substantial investigation into available mitigating evidence, in order to be effective his choice not to investigate must have been a reasonable strategic decision based upon reasonable assumptions. Three reasonable assumptions on which Leaphart's strategy not to substantially investigate available mitigating evidence have been proffered: 1) that Leaphart's theory of defense, or strategy, was to make the state prove its case; 2) that, if mitigating evidence had been offered at Burger's sentencing proceedings, Leaphart would have lost the right to opening and closing argument; and 3) that Leaphart chose to rely in closing on the argument that Burger had never been in trouble before, an argument which would have been undercut by an investigation into Burger's background. None of these strategies, and the assumptions on which they are based, withstand scrutiny for reasonableness.

Leaphart testified concerning his strategy or theory of defense in Burger's case:

> Well, of course, my theory of defense was of course trying to make the District Attorney prove his case. And my theory of defense was to—well, that in effect, in essence what it was. And, use whatever rules of evidence and to prevent him from doing so.[9]

And, specifically concerning the second trial solely on the issue of penalty, Leaphart again testified that he "[f]elt that case should have been tried on the facts and make the District Attorney—I say make him, use whatever rules of evidence to exclude those harmful facts." [10] The law provides that the state must prove its case, whether defense counsel is present or not. Relying on the state's case is not a "strategy" for the defense, but instead reflects an abandonment of counsel's obligation to develop a case for his client. This proffered strategy is tantamount to no strategy at all, and reliance on such a strategy, especially in the context of a capital sentencing proceeding, as an alternative to substantially investigating available mitigating evidence is patently unreasonable.

Second, Leaphart testified that he made a decision not to offer any evidence in mitigation in order to preserve his right to opening and closing arguments. Again, the basic assumption on which this strategy was based is patently unreasonable. O.C.G.A. § 17-10-2(a) & (c) (1982), formerly Ga.Code Ann. § 27-2503(a) & (c) (1933), provide for the conduct of sentencing proceedings in capital cases: "The district attorney shall open and the defendant or his counsel shall conclude the argument." The presentation of evidence by the defendant at a capital sentencing proceeding in no way affects this division of argument between the state and the defense. In fact, this procedure was followed at Burger's sentencing proceedings: the district attorney opened and defense closed final arguments to the jury. Leaphart simply failed to inform himself of basic Georgia criminal procedure in sentencing proceedings. *Cf. Young v. Zant*, 677 F.2d 792 (11th Cir.1982). No strategy based on such a false assumption is reasonable. The district court clearly erred in concluding otherwise.

The district court found that Leaphart's failure to substantially investigate available

9. THC at 18.

10. THC at 52.

mitigating evidence was based on a strategic choice to rely in closing argument on the "major argument" in Burger's behalf that he had no prior record of violent crime and had never been in trouble before. As it relates to Burger's second sentencing proceeding, this finding is contradicted by the record: at no point in his closing argument did Leaphart mention the lack of evidence that Burger had a record or had been in trouble before. Instead, Leaphart's closing argument at the second sentencing proceeding argued Burger's lack of culpability as compared to Stevens', and concluded with the plea for mercy. Neither argument would have been undercut by the presentation of humanizing evidence concerning Burger's background.

In conclusion, Leaphart's decision not to substantially investigate available mitigating evidence was not a reasonable strategic choice, and thus his failure to investigate constituted ineffective assistance of counsel.

The inquiry does not end with a finding of ineffective assistance. Burger may prevail only if he shows both a denial of effective assistance and actual prejudice to the course of his defense. *Washington v. Strickland*, 693 F.2d at 1258. Under any standard, in this case prejudice is apparent. *See Douglas v. Wainwright*, 714 F.2d 1532 at 1556–58 (11th Cir.1983).

At the federal habeas hearing, Burger offered the testimony of his mother and numerous affidavits concerning his troubled childhood and background. Summarized, this evidence was that Burger's parents had been married when his mother was fourteen and his father was sixteen. His parents divorced when he was a child. Neither parent wanted Burger and his childhood was spent shuffled between the two. His father threw him out of the house; his mother sent him back to live with his father. Burger's mother remarried. Burger's stepfather beat Burger, and beat Burger's mother in his presence; Burger's stepfather involved him in drugs and alcohol when he was eleven years old. Burger's mother and stepfather moved from Indiana to Florida. Burger was sent to live with his father. Burger's father beat him and refused to have anything to do with him. Burger ran away and hitchhiked to Florida to live with his mother, selling his shoes to buy food along the way. When Burger arrived barefoot in Florida his stepfather told him he could not stay with them. Burger's mother told the juvenile authorities that she didn't want him, and to send him back to his father in Indiana. When Burger arrived in Indiana, his father locked him out of the house. Burger was taken in by a neighbor, as he had nowhere else to go. The clinical psychologist who examined Burger testified at a motion hearing that Burger had an I.Q. of 82 and possible brain damage.

It is absolutely astounding to me that none of this evidence was ever presented to Burger's juries. The district court found that although the affidavits of the character witnesses supplied by Burger at the hearing do "contain references to a difficult childhood which might have created some sympathy for Mr. Burger," they also contained references to drug abuse, juvenile probation and violence. However, the thrust of the character testimony offered by Burger was not what Leaphart assumed without investigating, that Burger was a good boy and went to church, but that Burger's personality and motivation could be explained by his stormy and unhappy childhood. Although this is precisely the kind of humanizing evidence that "may make a critical difference, especially in a capital case," Leaphart failed to make a substantial investigation into its use. *Stanley v. Zant*, 697 F.2d at 969. Leaphart testified that "[I] did not have any knowledge of any witnesses that—potential witnesses that I thought would have benefited him. Had I known or had knowledge of any, I would—certainly would have used them."[11] The prejudice to Burger from counsel's failure to substantially investigate available mitigating evidence and present it

11. THC at 44.

at either of his capital sentencing proceedings lies in the alternative chosen by counsel: to present no evidence at all. On the basis of the state's case alone, two sentencing juries recommended the death penalty.

Failure to present this substantial, available mitigating evidence meets the prejudice prong of *Washington v. Strickland*, 693 F.2d at 1263–62, showing that "the petitioner suffered actual and substantial detriment to the conduct of his defense."

For these reasons, I would REVERSE the district court's finding that Burger was afforded the effective assistance of counsel during his state court proceedings and REMAND this case to the state court for a trial with Burger being represented by conflict-free and competent counsel.

Darlene R. WHITE, individually and on behalf of the class, Plaintiff-Appellant,

v.

I.T.T., a Corporation; International Telephone and Telegraph Corporation; XYZ Corporation, d/b/a I.T.T., et al., Defendants-Appellees.

No. 81-8000.

United States Court of Appeals, Eleventh Circuit.

Oct. 31, 1983.

Rehearing and Rehearing En Banc Denied Dec. 12, 1983.

Former employee sought to recover money damages for alleged breach of employment contract and fraud. Prior to trial, employee's application to maintain suit as class action was denied. At trial, the United States District Court for the Middle District of Georgia, at Columbus, J. Robert Elliott, J., directed verdict for one defendant and, following jury verdict against other defendant, entered judgment notwithstanding the verdict. Employee appealed. The Court of Appeals held that: (1) absent any evidence that employment was for definite duration, employee was terminable at will and had no claim against employer for breach of employment contract; (2) the contract claim being unenforceable, employer's purported promise to rehire employee could not form basis of fraud claim; and (3) dismissal, without elaboration, of class action claims for asserted failure to satisfy prerequisites of rule required remand for further proceedings on that issue.

Affirmed in part, and remanded in part.

1. Master and Servant ⇐20, 36

Under Georgia law, absent any evidence that employment was for definite duration, employee was terminable at will; thus, employer owed no enforceable duty to retain employee and employee had no claim against employer for breach of any employment contract. O.C.G.A. § 34-7-1.

2. Master and Servant ⇐20

Under Georgia law, hiring indefinite as to time is terminable at will of either party and creates no executory obligations. O.C.G.A. § 34-7-1.

3. Fraud ⇐12

Under Georgia law, if promise is unenforceable it cannot form basis of fraud claim.

4. Fraud ⇐12

Since employer's promise to rehire terminable-at-will employee after maternity leave was unenforceable under Georgia law, such promise could not form basis of fraud claims against employer either. O.C.G.A. § 34-7-1.

5. Federal Courts ⇐946

Where district court dismissed, without elaboration, employee's class action claims due to asserted failure to satisfy prerequisites of federal rule, and, after employee lost individual claim at trial, she appealed dismissal of class action, case would be remanded to the district court to determine presence of live controversy involving pro-

APPENDIX B

Order of Eleventh Circuit denying rehearing *en banc*

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FILED
FEB 13 1984
SPENCER D. MERCER
CLERK

No. 81-7419

CHRISTOPHER A. BURGER,

Respondent,
Cross-Petitioner,

versus

WALTER A. ZANT, Warden,
Georgia Diagnostic and
Classification Center,

Petitioner,
Cross-Respondent.

- - - - - - - - - - - - -

Appeal from the United States District Court for the
Southern District of Georgia

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion October 13, 11 Cir., 1983, _____F.2d_____).

(February 13, 1984)

Before VANCE and JOHNSON, Circuit Judges, and ALLGOOD*, Circuit Judge.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge

*Honorable Clarence W. Allgood, U.S. District Judge for the Northern District of Alabama, sitting by designation

APPENDIX C

Relevant Georgia Statutory Provisions

Ga. Code Ann. §26-1101(a)

[OCGA §16-5-1(a)]

16-5-1. Murder; felony murder.

(a) A person commits the offense of murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being.

Ga. Code Ann. §27-2534

[OCGA §17-10-30]

17-10-30. Procedure for imposition of death penalty generally.

(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason in any case.

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony;

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree;

(3) The offender, by his act of murder, armed robbery, or kidnapping, knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or another thing of monetary value;

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor, or former district attorney or solicitor was committed during or because of the exercise of his official duties;

(6) The offender caused or directed another to commit murder as an agent or employee of another person;

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated batter to the victim;

(8) The offense of murder was committed against any peace officer, corrections employee, or fireman while engaged in the performance of his official duties;

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement; or

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict is a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In nonjury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in subsection (b) of this Code section is so found, the death penalty shall not be imposed. (Code 1933, §27-2534.1, enacted by Ga. L. 1973, p. 159, §3.)

APPENDIX D

Guilt/Innocence Phase Jury Instructions

IN THE SUPERIOR COURT OF WAYNE COUNTY

STATE OF GEORGIA

STATE OF GEORGIA	*	INDICTMENT NUMBER 77-1641
	*	OFFENSE OF MURDER
-vs-	*	HONORABLE ROBERT L. SCOGGIN, Judge Presiding, and a JURY
CHRISTOPHER A. BURGER	*	JANUARY TERM, 1978 January 23rd and 24th, 1978.

CHARGE OF THE COURT

Ladies and gentlemen of the jury, the defendant, Christopher A. Burger, in this case, was indicted by a Grand Jury of Wayne County, Georgia at the November Term, 1977 of Wayne Superior Court. He is charged as follows:

"The Grand Jurors chosen and sworn for the County of Wayne, in the name and behalf of the citizens of Georgia, charge and accuse Christopher A. Burger and another named individual with the offense of murder for that the said Christopher A. Burger and another named individual on the 5th day of September in the year of our Lord, Nineteen Hundred and Seventy-seven, in the county aforesaid, did then and there unlawfully, wrongfully, feloniously, and with malice aforethought, kill and murder one Roger E. Honeycutt, a human being, by drowning the said Roger E. Honeycutt, all of said act being contrary to the laws of said State, the good order, peace and dignity thereof."

I will tell you now that you will disregard the other named individual entirely, and consider the case as to

Christopher A. Burger only.

I charge you that neither the language contained in this indictment nor its return by a Grand Jury of this County constitutes any proof as to the guilt of the accused, Charles A. Burger, in this case. He has entered a plea of not guilty, and I charge you that his plea of not guilty does note constitute any proof of his innocence in the case. The indictment, the language contained in the indictment, the charge contained in the indictment, and the plea of not guilty entered by the defendant do form the issue which you are to try and determine by your verdict.

I charge you that the defendant enters upon the trial of this case with the presumption of innocence in his favor and that presumption remains with him throughout the trial and until and unless the State shall introduce sufficient evidence in your presence and hearing to convince your minds beyond a reasonable doubt as to his guilt.

Now, a reasonable doubt, ladies and gentlemen, means just what it says. It is a doubt of a fair-minded, impartial juror, acting under the sanctity of your oath, honestly seeking the truth. It is not an arbitrary or a capricious doubt, but it is a doubt arising from a consideration of the evidence or from a lack of the evidence or from a conflict in the evidence. If, after considering all the facts and circumstances of this case, your minds are waivering, unsettled, and unsatisfied, then that is the doubt of the law and you should acquit this defendant.

However, if that doubt does not exist in your minds as to his guilt, then you whould convict the defendant.

I charge you further, ladies and gentlemen, that you are the judges of both the law and the facts in criminal cases, and this is a criminal case. The law you take from the Court as given you in charge, and the facts you get from the witnesses who testified, and from the evidence admitted as exhibits, State's Number "1" through whatever number were introduced.

I charge you further, ladies and gentlemen, that you are made the exclusive judges and the sole judges as to the credibility or believability of all the witnesses who appeared and testified in this case. And, in passing upon their credibility or believability, you may consider the witnesses' manner of testifying upon the witness stand, their interest or lack of interest, their means and opportunity for knowing about the facts to which they testified, their reasonableness or unreasonableness of their testimony, their prejudice or bias, if any should appear in the case, and you have the right to consider the personal credibility of the witnesses insofar as the same may legitimately appear upon the trial of this case.

Now, the Court did allow into evidence testimony by the Military CID special agents and by Deputy Sheriff Johnny Shuman relative to certain statements that may have been made by this defendant, Charles A. Burger - or Christopher A. Burger. And, before you consider this as

evidence for any purpose you must first decide two questions.

First, was the defendant warned of his constitutional rights, and did he clearly understand and knowingly give up such rights? And second, was any statement he may have made, clearly made made voluntarily and freely?

The rights which must be explained and which must be understood and given by the defendant before any statement is taken by the police, military police or civilian police, are as follows:

That he, the defendant, Christopher A. Burger, had a right to remain silent.

That if he chose not to remain silent, anything he said or signed could be used as evidence against him in Court.

That he had a right to consult a lawyer before any questioning, and to have the lawyer present with him at all times during any questioning, and that if he did not have the money for a lawyer, a lawyer would be provided for him by the State, to represent him, before any questioning and to be present with him during any questioning.

To be admissible, any statement made by Christopher A. Burger must have been freely and voluntarily made, and willingly given, with complete understanding and without any threats or fears, or violence or injury, or even a suggestion of any promise of leniency or reward. A statement induced by the slightest hope of benefit or the remotest fear of injury is not voluntary. To be voluntary, a statement must be the product of a free will and not under compulsion or

or any necessity imposed by others.

The burden of proof is upon the State to establish that the warning of all these rights mentioned to you were given, that they were clearly understood and knowingly given up by this defendant, and that the statement was voluntarily and freely and willingly made.

Now, if you find that all of the warnings as to his constitutional rights were given, that the defendant did clearly understand the meaning of what was said, and that he knowingly gave up such rights, and if you further find that any statement he may have made was freely and voluntarily made, then you will consider it as evidence, and you will apply the general rules for testing the believability of witnesses and decide what weight, if any, you give to any part of such evidence. However, if you fail to find any one of the conditions which I have just described to you, you must disregard the statement entirely and give it no consideration in reaching your verdict.

You should consider with great caution the evidence of any admission, statement or incriminatory statements made by this defendant. In weighing such evidence, you should consider whether the statement was made by this defendant, whether it was truthful, whether it was accurately repeated by witnesses here before you, whether this defendant understood what was said, the circumstances under which it was made, the emotions of hope or fear that may have existed, if any.

You, the jury, may believe admissions or incriminatory statements in whole or in part, believing that which you find to be true, and rejecting that which you find to be untrue. Upon you alone rests the duty to apply the general rules for testing the believability of witnesses and to decide what weight should be given to all or any part of such evidence.

I charge you further, ladies and gentlemen, that in considering the evidence in this case and the testimony in the case, if you find there are conflicts in the evidence about material matters, it becomes your duty to reconcile such conflicts, if you can, without imputing perjury to any witness; the law presuming that all witnesses tell the truth until the contrary is made to appear from the evidence.

If, however, after an honest effort to reconcile such conflict, if you find there are conflicts, you still cannot do so, it then becomes your duty to believe that witness or those witnesses whom you think are most entitled to credit and belief.

Now, the object ofall legal investigation is the discovery of the truth. Direct evidence is that which points immediately to the question at issue. Indirect or circumstantial evidence is that which tends to establish the question at issue, by proof of various facts and circumstances sustaining by their consistency, the hypothesis claimed.

I charge you that moral and reasonable certainty is all that can be expected in a legal investigation. And, whether

dependent upon direct or circumstantial evidence, the true question is not whether it be possible that the conclusion at which the evidence points may be false, but whether the evidence, all of the evidence, is sufficient to satisfy your minds and your consciences beyond a reasonable doubt.

A person will not be presumed to act with criminal intention, but the jury may find such intention upon consideration of the words, conduct, demeanor, motive and all other circumstances connected with the act for which the accused is prosecuted.

Now, under our law every person concerned in the commission of a crime is a party thereto, and may be charged with and convicted of the commission of the crime. A person is concerned in the commission of a crime only if he directly commits the crime, or intentionally causes some other person to commit the crime under such circumstances that the other person is not guilty of any crime, either in fact or because of legal incapacity, or intentionally aids or abets in the commission of the crime, or intentionally advises, encourages, hires, counsels or procures another to commit the crime.

Any party to a crime who did not directly commit the crime may be indicted, tried, convicted and punished for commission of the crime upon proof that the crime was committed, and that he was a party thereto, although the person claimed to have directly committed the crime has not been prosecuted or convicted, or has been convicted of a

different crime or degree of crime, or has not amenable to justice or has been acquitted.

In this case two defendants are named; that is, Christopher A. Burger and Thomas D. Stevens. You, ladies and gentlemen of this jury, are to concern yourselves only with the trial of this defendant, Christopher A. Burger. The other defendant is to be tried by other jurors at a different time.

Now, I further charge you that although a person may have been present at or near the scene of a crime, that if he did not in any way intentionally aid, abet, procure, or intentionally participate in the commission of said crime he would not be a party to said crime.

Now, by definition, ladies and gentlemen, in our State a crime is a violation of a statute of this State in which there shall be a union of joint operation of act, or omission to act, and intention, or criminal negligence. I give you certain presumptions of law that are applicable to this case.

A presumption is a conclusion which the law draws from given facts. Each of these presumptions are rebuttable. That is, they are subject to being overcome by evidence to the contrary.

I charge you now the presumptions that are rebuttable. Every person is presumed to be of sound mind and discretion. The acts of a person of sound mind and discretion are

presumed to be the products of the person's will. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts. A person will not be presumed to act with criminal intention, but the jury may find such intention upon consideration of the words, conduct, demeanor, motive and all other circumstances connected with the act for which they accused is prosecuted.

A specific intent to commit the crime charged in this indictment is an essential element that the State must prove beyond a reasonable doubt. Intent is always a question for the jury, and is ordinarily ascertained by acts and conduct. Intent may be shown in many ways, provided the jury finds that it existed from the evidence produced before you. It may be inferred from the proven circumstances, or by acts and conduct, or it may be presumed when it is the natural and necessary consequences of the act.

The law permits certain witnesses who have had special training, knowledge and experience in certain lines, such as the doctor from the State Crime Lab and the finger-print expert, to give their opinions as experts, based upon their knowledge of particular matters. I charge you that the weight which is to be given the opinions of expert witnesses is for you to decide. You may accept it and act on it, or you may reject it, and then act on your own judgment, as you apply it to the evidence in the case.

Now, the specific statute this defendant is charged with

having violated at the time and place named in the indictment is that of murder. The definition of our law of murder is: A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate intention, unlawfully, to take away the life of a fellow creature which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart.

A person also commits the crime of murder when in the commission of a felony, he causes the death of another human being, irrespective of malice.

I charge you that if you believe beyond a reasonable doubt that this defendant committed the crime as charged in this indictment, at any time prior to its return by the Wayne County Grand Jury, it would be your duty to convict him. In that event, the form of your verdict would be: "We, the jury, find the defendant guilty."

If you do not believe the defendant is guilty, or if you do not believe that he is a guilty beyond a reasonable doubt, it would be your duty to acquit him, or if there is a reasonable doubt in your mind as to his guilt, it would be your duty to acuit him. And, in that event, the form of your verdict would be: "We, the jury, find the defendant not guilty."

Before you go to your jury room, I do want you to understand that throughout this trial there have been many motions and objections, and statements by counsel for both sides, and by the Court. I emphasize to you that by no ruling which this Court has made during the progress of the trial before you has the Court intimated or expressed any opinion upon the facts of the case, upon the credibility of the witnesses, upon the weight of the evidence, or upon the guilt or innocence of this defendant. By no portion of this charge has the Court intimated or expressed any opinion upon these matters, each and all of which belong exclusively to you jurors for your judgment and your determination.

The Court states the law. You find the facts. You apply the one to the other, and in that way you decide the outcome of the case.

Under our law you are made the sole judges of the facts of the case. You are the sole judges of the credibility of the witness. You are the sole judges of the weight of the evidence. You are the sole judges of the guilt or innocence of the prisoner at the bar.

Now, when you go to your jury room, ladies and gentlemen, the first thing you need to do is elect your foreman. Then once the bailiff or sheriff, or deputy sheriff brings to you this indictment, and all of the exhibits which were introduced to you, after you received that and after you have elected you foreman, you may begin your deliberations as to the verdict in the case.

Once you have agreed upon a verdict, let the bailiff

stationed at your door know of that, and you will be brought back into the courtroom for publication of your verdict. Let your verdict be in one of the forms suggested to you by the Court to indicate your finding.

After all, since the beginning of the word itself, its very origin, the word "verdict" has always related to the word "truth". Therefore, let your verdict speak the truth. It must be unanimously agreed to by all of you, and it must be reduced to writing, and it should be written on the back side of the indictment at the very tip top of the page where it the printed words begin, "We, the jury, find the defendant blank", and there is a blank line there. Then it should be dated this date, signed by your foreman at the place indicated by the printed line, and the word under it, and then returned into open court.

I do repeat your verdict must be unanimous. The twelve of you in the jury box may retire to your jury room. And, the two of you who are alternate jurors may come out into the separate room where you were earlier.

You may retire.

83-6413

Jan. 23-24, 1978
- Original Trial on Sentencing -

Mr. District Attorney, do you have additional evidence or argument that you wish to put up?

MR. THOMAS: Can we approach the bench, Your Honor, just a minute?

THE COURT: Yes, sir.

(NOTE: Colloquy between Court and Counsel.)

THE COURT: Ladies and gentlemen, before going further as to the second feature of your duties, we will give you a short recess, and you may retire to your jury room. I will ask the alternates to step outside and remain separate and apart from the other twelve.

Mr. Foreman, you and the other ladies and gentlemen may go back to your jury room.

(NOTE: After a brief recess, the jury returned to the jury box, and the following transpired:)

THE COURT: For the record, gentlemen, do I understand that neither sides has any additional evidence to put up, either in aggravation or for leniency or mitigation?

MR. THOMAS: That's correct from the State, Your Honor.

MR. LEAPHART: Excuse me, Your Honor. Yes, sir.

THE COURT: All right. Proceed with your argument. Mr. Leaphart, you have the opening and concluding.

MR. LEAPHART: Your Honor, we waive the opening and reserve the right to conclude.

THE COURT: All right. Mr. Thomas.

MR. THOMAS: If it please the Court, and ladies and gentlemen of the jury, we expect Your Honor to give you in

We thank you.

THE COURT: Judge Leaphart.

MR. LEAPHART: Ladies and gentlemen of the jury, you have heard the evidence in this particular case, and you have found Christopher Burger guilty of the crime of murder. You have found that he killed Roger Honeycutt with an abandoned and malignant heart. That within itself is not enough under our laws to put him to death.

You've got to consider all the other ramifications involved in the case. One of the things is that there has been no evidence introduced here to show you that Christopher Burger has any history of any past crimes. If he had a history, a record of past offenses, you would have the benefit or could have the benefit of that, if the District Attorney saw fit to introduce it, and give you the benefit of past offenses.

So the fact that there has been no evidence that Christopher Burger has ever been convicted of any other crime is something for you to consider in whether or not to give him the death penalty. Most certainly there is no history that Christopher Burger ever committed any other offense of violence against anyone else in the past. So this is not some hardened criminal that you are dealing with that has been in and out of the penitentiary for numbers of times, for robbery and any other charge that he may have been convicted of. This is a man who has never, as far as the evidence in this case is concerned, never been in any trouble

Sentencing feature

in his life. That is something for you to consider. Now, you've got to go back and rehash to a certain extent all the evidence that you have heard in this case, and you get right down to the fact of certain witnesses who were at the call of the District Attorney who the evidence shows were present at the time that Burger made certain statements, who were not called to testify by the District Attorney, and he is asking you to make your decision to put this person to death when he did not give you all the evidence that was available concerning the admissions of Burger. When you get right down to it, when you get all the evidence, sift through all this evidence you come down to two things. You come down to a statement by Botsford who tied him into a situation, and then the testimony of Kaire, one of the investigating officer, as to the initial confession of Burger. You get right back to the fact that the FBI Agent Brewer was there, and heard and participated in the questioning of the defendant, and I feel out of fairness if you were going to be asked to put this defendant to death that he should have - you should have had the benefit of what he heard and what he understood that Burger said. He may have understood things a little bit different. I don't know. You don't know. Probably will never know, but there is a doubt in our minds that this could and did exist, and you could infer by the fact that they are not here that the District Attorney had some reason for not bringing these individuals here to testify before you.

He's alluded to drowning a horrible way to die. Well, of course, there is no nice way to die. There is no nice way to murder anybody. The drowning, if you know anything about drowning, drowning is simply strangulation. If you view it in that manner and in that effect, in that way, of course, most of us have a certain feeling about drowning, because water is alien to us. We don't have the same idea in our minds in looking at this situation like you are looking at it if he had been shot a couple of times.

He's just as dead whether he was shot or whether he was stabbed, or whether he was drowned. So drowning should not really be considered by you as a mitigating or an aggravating circumstance. It is just the method by which he was killed.

Now, you get back down to capital punishment and the reason for capital punishment. The District Attorney has alluded to the "eye for an eye, and a tooth for a tooth", "life for life". Well, that is the old Jewish law, and still is the Jewish law, and is still the law as the Moslems carry out in the desert communities in the Arabian deserts and places of that nature, where they live in tribes and move from place to place.

The reason for the Mosaic Law and the reason, one of the basic reasons for that harsh justice that was imposed by the earlier Jews in their march from Egypt to they finally got to the Promise Land was the fact that they would not stay long in one place, that they couldn't put up with prisoners.

They couldn't - they had no way to house prisoners. So when you did something wrong, when you stole something from somebody, when you got in a fight with somebody and put out somebody's eye, or when you killed somebody, well, they just said, 'Well, you've killed him, so that's it. Blam, because we don't have time to fool with you, because we've got to be on down the road about another thirty or forty miles tomorrow and we have no place for you.'

They heeded the swift tribal justice. And, that swift tribal justice, if you read in the papers, is still being carried in Saudi Arabia, and places like that, because these people still move about in the same manner that Moses and them moved about thousands of years ago.

After the Jewish people settled in what is now Israel or the Promise Land, they went from an urban - from a tribal society which moved about to a - from tribal to nomadic society, to an urban society, and they built houses, and communities, and they lived in one place. And, at that time, they began to build prisons, and places of punishment and confinement for people who committed crimes.

They no longer cut their hands off, or put out their eyes, or chopped their heads off if they did certain things. They began to an urban way of life. And, with the help of the Romans they progressed up until the time of Jesus Christ.

Now, Christ came along and brought in the idea that 'Just a minute, we don't need this old attitude of an eye for an eye, and a tooth for a tooth. You shoot me. I'm gone

shoot you. That's not the way we ought to do things. There is a better way. And, we should try to rehabilitate; we should confine; we should do this; but, let's do not take the lifes of other people, even though they make take our life or someone elses."

That is the Christian philosophy. That is the philosophy that is suppose to be followed by all of us who profess to be Christians. Now, if you are a Moslem or a member of the Jewish faith, then follow the Mossic Law, follow the Moslem Law, follow an eye for an eye, and a tooth for a tooth, a life for a life. But, if you are a Christian, you don't have that attitude.

A lot of us profess to be Christians. A lot of us claim to be Christians. But, when it comes down to practicing the Christian religion, the basic faith which most of us are suppose to follow, we, and I am no exception, sometimes only give it "lip service", and try to appear that way to other people.

You know, it is hard to be a Christian. Christ was crucified, he was killed because of his concepts. Various of his disciples, because they dared to take his philosophy, in that harsh day and time, and said "there is a better way, that we shouldn't do this any longer. This is not the way to do it. We should understand or try to. We should try to forgive. We should try to rehabilitate." Those people because they said this were unceremoniously killed by those who believed in an eye for an eye, and a tooth for a tooth.

Paul, follower of the Christian Church after Christ, under out laws today, for the things he did to the Christians would be put in the penitentiary. He was responsible for the death of many Christians, until the time of his rehabilitation and the time of his conversation into Christianity, at which time he changed the name of Saul to Paul, and took our on a road in an entirely direction than he took or had taken as a practicing Jew, an Abider, an Arabi, and an Abider of the Mosaic Law.

If Paul, if you look in the Bible at Paul. Paul changed. Paul got another chance. Christ didn't believe in this thing.

You people on the jury are going to fix the death penalty; not the Judge; the Board of Corrections; not whoever they've got down there that is going to actually go through the act of killing the individual that you designate to die. There are going to be twelve minds; not eleven, not eleven. Twelve minds in unison have to direct this Judge up here to sentence this man in whatever manner to whatever sentence is going to be imposed on him.

If you, your twelve minds direct him to sentence him, this boy here, to die, then it takes thirteen hands to execute him. There would be one man in person at the date of execution, and each one of you in spirit and mind.

You don't live in a vroeum. What you do today is not something that you can do and walk away from, and forget about it. Whatever decision you make, something that each

and every one of you are going to have to live with, sleep with, dream with and die with.

It is not something that will leave you the minute you walk away from this place. That is why, that is why each an every one of you have such an awful responsibility. You act as a group, but you can't - the group can't act without the individual. It takes twelve. It don't take eleven. It takes twelve to execute him.

The only thing that I say, and I ask you, is when you make up your mind, if you are Jewish, you believe in the Jewish faith, you believe in the Moslem faith, think like Moses would have thought. And, if you can content yourself with the thoughts of Moses and Moses' attitude, if that is what you really believe in, if all this other thing is only something you paid lip service to, go ahead and let everybody know it. But, if you are a Christian, ask yourself, what would Jesus Christ do in this situation?

And, when you ask yourself this, and if you honestly and in your heart put in the manner in which you think He would have acted, then you are not going to wake up some night and ask yourself did I do the right thing?

Thank you.

(NOTE: Thereupon the Court charged the following to the jury:)

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THE COURT: All right, sir. Are we ready to proceed, Gentlemen?

MR. LEPRARK: Yes, sir.

MR. THOMAS: Yes, sir, I think so.

THE COURT: Bring them in.

(Whereupon the jury returned to the courtroom.)

THE COURT: All right. Gentlemen, proceed with your Argument. The State has the opening. The Defendant has the closing Argument.

MR. TATUM: If it please the Court, Ladies and Gentlemen of the jury, I told you at the outset of this case that this was a retrial of the sentencing phase of this particular case.

I told you also that the Court would instruct you that the Defendant, Christopher A. Burger, was convicted for the offense of murder. And, you're concerned only with the sentencing phase, as we call it, and as you refer to it of this particular trial.

I also told you in the beginning and at the outset that the State of Georgia expected to show you by and under the evidence of this case aggravating circumstances that we contend existed during the commission of this offense.

I pointed out to you that we expected the evidence to show at least three aggravating circumstances to have existed during the commission of this murder. Those aggravating

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THE COURT: Judge Leaphart.

MR. LEAPHART: May it please the Court, just one second, Your Honor.

MR. THOMAS: If the Court please, Your Honor, prior to our going into any kind of exhibits, I'd like to have a bench conference with the Court, please.

(NOTE: Colloquy at bench.)

THE COURT: All right. Proceed.

MR. LEAPHART: Your Honor, would you give me just a second to get something to back that up, because I need, since I'm going to write on it I need to have something on it to back it.

THE COURT: Yes, sir. Do you know where there is something handy?

MR. LEAPHART: Ladies and Gentlemen of the jury, I'm sorry for, may it please the Court, I'm sorry for the interruption. I will use this blackboard in lieu of what I intended to use.

The District Attorney, of course, has pointed out what his contentions are as he is required to do in his advocacy of the State's position.

And, now it's my turn to point out to you certain things that I think will mitigate the circumstances or change the situation as outlined by the District Attorney, which does not require of you to give the death sentence. But, that justi-

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would best be served in this instance for a life sentence.

Now, the evidence shows that in this particular case there were two parties involved, Stevens and Burger. What were the ages of these parties? Stevens was twenty years old. Burger, seventeen years old.

The evidence in this case, who made the first aggressive move in the cab? The evidence shows that the sharpener came first by Stevens. Next the knife to aid Stevens. The first two aggressive acts.

Then, Burger then - Stevens then made him get out of the car. I just put out of car. Stevens robbed him from testimony, and you'll have his statement. This is a photocopy of his statement which they had produced in evidence, which shows that the robbery was actually perpetrated by Stevens. He got the money, he robbed the man. All right. Stevens robbed him.

MR. THOMAS: No object to that now, Your Honor. That's a misstatement. The evidence shows they split the money.

MR. LEAPHART: Stevens performed the act of robbery

THE COURT: The jurors will decide the facts, Gentlemen.

MR. LEAPHART: Stevens made him undress. Stevens performed the oral sodomy, the anal sodomy. Burger was not involved in that, did nothing to - he was in the front seat of the car driving the car. He did none of that. Stevens tied him up. Stevens told him to get in the trunk. And, Stevens stated that they ought to kill him. At that point

Burger, what did he say according to Botsford? Burger said "no, I don't want to kill him."

Now, I'm showing the attitude of the individuals at that time. And, who was actually perpetrating and who was actually the moving force in this particular set of circumstances. And, he said "no". What did Stevens do at that time? He told him to drive the car to the pond. Now, you'll have this in this statement right here, told to drive to the pond. And, he did what Stevens told him to. He got down there and the next thing that Stevens said, says "we must get rid of the car." The next thing he said, Stevens, according to the evidence in this particular case and according to this statement right here, said "we must get rid of the fingerprints." And, then he said, told him to drive it into the pond. And Burger, the seventeen year old, drove it into the pond.

There is Burger's overacts in the participation in the crime of murder for which he's been convicted. Each and every one of these acts, according to this statement which they have introduced into evidence, the initiation of the crime, the act of robbery, the acts of sodomy, the acts of tying him up, the telling him to get in the trunk, the saying let's kill him, telling him where to drive, telling him we must get rid of the car, we must get rid of the fingerprints, who was that? That was all Stevens. Stevens is not on trial here today.

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Now, this boy here was seventeen years old at that time, and Stevens was twenty. Now, we all know that the influence that a twenty year old person has over a seventeen year old person who he looks on as his friend and companion. And, all of this bears out that Stevens was the one in control. Now, that doesn't relieve Burger from being guilty of the crime of murder. Murder in this State or murder under the definition is the deliberate killing of another human being without any just cause. And, he has already been convicted of killing another human being without just cause. And, that under the laws of this State does not justify the death penalty.

The death penalty has to be shown aggravating circumstances existed. And, the Judge is going to charge you this. If you see fit, and this is a matter entirely to your discretion, you may provide for a life sentence for the accused based upon any mitigating circumstance, or a reason satisfactory to you, or without any reason. You may recommend life imprisonment even though you have found aggravating circumstances, or one or more of the aggravating circumstances given to you in this charge to have existed beyond a reasonable doubt.

Well, why is that the law? That's the law because of the situations such as this where you have a moving force, and you have a person who follows along and does the beating of an individual, who gets convicted of murder. And, the

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person who actually perpetrated the crime was, and actually was the catalyst, the moving force that carried it all about and did all these things even though this person was a part of it, that the punishment of one is different from the punishment of the other, or can be. That was in your discretion.

And, in this particular situation, even though you say under these set of circumstances these things existed, Burger did none of that, except being involved there at that time and going along with Stevens who was the leader.

Now, I know that the idea of rape and sodomy is shocking to anybody, even more so to people who have, whose work in life is totally foreign to this type of thing. But, this is something that exists. It happens. And, the reason that a woman's attitude towards these things, if you stop and think, is the vulnerability of woman to sex abuse throughout history. And, women have a natural fear of this type of thing. And, you should not let that prejudice your mind, or you men who the idea of being forced to commit such as this would be totally degrading as far as you're concerned. The mere fact that this happened should not steal your minds to such an extent that you lose the ability to sift between who was the one who really did this, and who was the one who happened to be there when it occurred.

There's no evidence in this case that Burger did anything

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involving those particular acts. It's to the contrary. There's nothing here. Now, I would dare say if it wasn't for these two acts that were done by Stevens, that your attitudes toward this particular case would be entirely different than what it is, if you think about it just for a minute.

Now, you've listened to the District Attorney talk about this in a very passionate speech. But, you don't put a person to death just on, based on a passionate speech or whatever, and your own prejudices in hearing things. You've got to be logical. You started out and promised this Court and you stated under oath that you were completely neutral at the very beginning, and you should've been. And, you should view this evidence in view of what one did as to what the other one did.

Now, he's already been found guilty, as I said, of the crime of murder. And, it's up to you to determine the punishment. He's already been found guilty of the deliberate killing of one human being in the peace and dignity of the State of Georgia without just cause. And, that and in and of itself does not allow you to give him the death penalty. And, the facts and circumstances in this case are not such that Chris Burger under the evidence is entitled to such.

Now, we all hear about an eye for an eye and a tooth for a tooth and all this. Now, one of the things that I asked you or the Court asked you was your religious affiliation. Each

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and everyone of you are affiliated with some church according to what you say and according to what you intimated, each and everyone of you follows the teachings of Jesus Christ and believes in the Old Testament as well as the New Testament whichever, according to your denominational, whatever denomination that you belong to.

If you remember the Bible, the first murder that took place in the Bible was when Cain killed his brother Abel. Now, if you recall that Cain was, he was a farmer, and Abel was a shepherd. And, Abel made certain sacrifices and Cain did. And, because God was more pleased with Abel's sacrifices than Cain's, Cain got mad and jealous and killed him. But, what did God do? Did he - and Abel was at that time, according to the Bible, was just as close as anybody on earth to Him. What did he do? Did he reach out in a righteous indignation and knock him down, and kill him at that time? He didn't, if you recall. He says - you all heard of the mark of Cain. He says "I'm gone put a mark on you so everybody will know what you did. And, everywhere you go they will know that you killed your brother Abel." And, then Cain said "well, look, if they find out who I am, they're gone kill me." He said "no, they're not." He said "I'm gonna protect you. And, you will live with men and be despised."

Now, God Almighty in the Old Testament, the vengeful

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God we all read about, we were all taught about, before Jesus Christ ever got here, did not take the life of the man who murdered his most faithful servant and worshiper.

Our laws, our legend, our Constitution and everything else that we believe in, and we're supposed to build our lives and government on is found in the Old and New Testament and the various philosophies of Europe, England,and the philosophies that we develop in this country. But, the very foundation, that's the very foundation of the laws of this countr and this state.

We get along to the point that Moses came along, and they invented or brought about an eye for an eye and a tooth for a tooth. Now, if you will recall, at that particular period of time there were no nomadic societies, traveling back and forth through the desert. They didn't have time to fool with criminals. They didn't have time to rehabilitate anybody. They didn't have anything to confine anybody in, so they had to deal with people and punish them right then and there because they were moving on the next day, and they couldn't be bothered with hauling somebody around in chains.

They finally settled down and developed an urban society, and along come the Roman Empire and Jesus Christ. And, Jesus Christ said 'look, there's got to be a better way. Said 'man can be rehabilitated, man can change. Man should not be treated with the indifference that he was treated in

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the Old Testament." And, so along come the philosophy of Jesus Christ.

Now, we are supposed to be christians. And, one of the problems of our young people today is they see their mothers and fathers going to church every Sunday and sitting on the first and second and third row, and acting like christians, paying lip service to Jesus Christ. And, come Monday morning or ever Sunday afternoon in some events they forget all about it. They forget about this love thy neighbor stuff, and then they start gouging their fellow man from Nine to Five, five days a week, and fooling around on Saturday, and then going to church on Sunday. That's one of the things wrong with our society is we claim to believe so much, and we claim to stand for so much. We claim to believe in Jesus Christ on one hand, and then we'd want to practice the, what amounts to the Islamic Law on the other one.

We read in the newspaper what they're doing with their people in Iran. They're killing that, they're executing them right and left under the Islamic Law.

What you've been called upon to do is a very serious thing. And, it's a thing, a decision that you have to make. And, you as jurors can consider every aspect. You are the judges of both the fact and the law. And, in this particular instance you can use all your experience in life, your religious affiliation, your beliefs, what you think is right

in terms of what you feel.

I want to ask you to do one thing before you go out. When you consider all of this, when you consider what was done, and then you break it down, and you consider who did what, who was the actual moving force, ask yourself one thing. Ask yourself this question. What would Jesus Christ do if he were sitting in our shoes today?

(WHEREUPON, the Court's charge follows:)